

## Avoiding Common Pitfalls under the FLSA: A Guide to Basics

by Robyn Hylton Hansen

The United States Congress passed the Fair Labor Standards Acts (FLSA) in 1938, as a part of the economic recovery initiatives that followed the Great Depression. FLSA applies only when an employer/employee relationship exists. Generally, an employer of more than two employees, who is engaged in interstate commerce, is considered an employer under FLSA. Certain special exemptions exist to these provisions which will not be discussed in this article.



FLSA is probably one of the more misunderstood and unintentionally violated statutory schemes in the workplace. When and to whom overtime payments are due is one area that often confuses employers. FLSA requires that covered, "nonexempt" employees receive overtime pay for hours worked over 40 per workweek (any fixed and regularly recurring period of 168 hours — or seven consecutive 24-hour periods) at a rate not less than one and one-half times the regular rate of pay. Employers generally are not required to pay overtime for hours worked in excess of eight hours in any one day. Additionally, overtime pay is not required for working holidays or weekends unless the time spent working actually exceeds 40 hours. Overtime is calculated by reference to the employee's regular rate of pay. Regular rate of pay is all remuneration for employment paid to or on behalf of the employee.

Purely discretionary bonuses not based on hours, production, or efficiency, Christmas gifts or payments to qualified profit sharing plans are recognized exclusions from ascertaining the regular rate of pay. Compensatory time-off or "Comp Time," is not available as an alternative to overtime for private sector employees. It, however, is available to

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### FLSA Overtime Liability for Different Jobs with Same Employer

by Lauren C. Baddar

Recently, we received several inquiries regarding liability for overtime compensation under the Fair Labor Standards Act (FLSA or the Act) when a non-exempt employee performs work in more than one job for the same employer.

The fact that the employee is performing different jobs does not, on its own, exempt the employer from overtime liability. However, FLSA does provide for simplification of the calculation of overtime for such employees. Furthermore, in certain instances state and local government employers may be eligible for an exception from overtime liability when non-exempt employees work in different job capacities within the same organization.

#### *Simplification of Overtime Calculation*

Department of Labor regulations promulgated under the FLSA permit employers to assign an employee different straight time *(continued page 3)*

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## *FLSA Basics (continued)*

public sector employees. Comp time occurs when a public employee is given the opportunity to accrue time off at the rate of time and one half for all overtime hours worked in excess of 40 in a work week in lieu of receiving overtime pay.


Congress has set forth certain categories of employees that are exempted from the overtime provisions of FLSA. Exempt employees are generally white collar workers. The exempt standard is strictly construed against the employer, meaning that the employer must precisely meet each element of an exemption with respect to each claimed exempt employee.

The failure to abide properly by the standards causes the employee to become non-exempt. FLSA sets forth six categories of exempt employees, three of which are traditionally recognized exemptions. The six exemptions are:

- Executive Employees
- Professional Employees
- Administrative Employees
- Highly Compensated Employees
- Computer Related Occupations (as defined in DOL Regulations)
- Outside Sales Employees

In order to qualify as exempt, an employee, except for outside sales, must meet two tests. One test is known as the specified duties test. In order to meet that test, the employee must perform duties consistent with the exempt position. The second test involves the method of compensation. As a general rule to qualify as exempt, an employee must be paid on a salary basis. A professional, administrative or computer-related employee may also be paid on a fee basis and still qualify as exempt.

Meeting the salary basis component appears to be one of the biggest contributors to the confusion in understanding and misapplying the FLSA. An employee will be considered to be paid on a salary basis if the employee regularly receives a predetermined amount representing all or part of the employee's compensation each pay period. This amount cannot be subject to a reduction due to variations in the quality or quantity of the work performed. The employee must receive a full salary for any week in which the employee performs any work without regard to the number of days or hours worked; however, an employee need not be paid for any work week in which the employee does not perform any work.

Employers often misapply these rules by either paying employees on a salary basis without regard to their job duties; or by paying a specified salary but making deductions from that salary in hourly increments. In certain instances specified in the Regulations, a deduction may be made from the pay of an exempt employee without destroying the salary basis test. These deductions, however, in most instances must be made in full day increments with some limited exceptions including approved leave under the Family and Medical Leave Act. 



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(FLSA Overtime continued)

pay rates based on the type of work they perform. Furthermore, employers are permitted to pay overtime at time and half the straight time rate established for the type of the work that the employee performs during the overtime hours provided that this method of computing overtime pay is not used as a device to avoid payment of the minimum wage due for each hour and the following criteria are met:

1) the employee agrees with the employer in advance to be paid under such arrangement; (2) The hourly rate used to calculate the overtime is based on a bona fide rate meaning it is equal to or greater than the applicable minimum rate for the particular kind of work and it is the rate actually paid for the same type of work performed during non-overtime hours; (3) the overtime hours for which the over-time rate is paid qualify as overtime hours as defined by the Act; and (4) the number of overtime time hours for which the overtime rate is paid equals

or exceeds the number of hours worked in excess of the applicable maximum hours standard.

***Limited Exception for State and Local Government Employees***

FLSA provides an exception for public agencies such that such employers need not combine hours worked by their employees in different jobs provided certain criteria are met. To qualify for this exception, the work must be performed solely at the employee's option and be performed occasionally or sporadically on a part-time basis for the same public agency in a different capacity from the employee's regular employment.

The Department of Labor (DOL) has defined "occasional and sporadic" to mean infrequent, irregular or occurring in scattered instances. DOL regulations also provide guidance on what type of work qualifies as work in a "different capacity" requiring that the work must not fall within the same general occupational category. 🏛️



## When Can an Employer Deduct Funds from an Employee's Wages? *by Rebecca Shwayder Aman*

One of the more common questions we receive from clients involves determining when an employer can deduct amounts from employee wages. This issue often surfaces in the following situations:

(1) The employer wants to be reimbursed for something that was given to the employee but not returned, such as company uniforms or tools. (2) The employer wants to be reimbursed for payments made on behalf of the employee, such as insurance premiums, pay advances or personal loans. (3) The employer believes that the employee has caused or allowed the employer to be damaged. (4) The employer wants to discipline the employee for an act of misconduct or failure to follow some company policy.

While deducting funds from an employee's paycheck might appear to be a simple way to address any of the above situations, Virginia law prohibits paycheck deductions except under very specific conditions. The reasoning behind this rule is that the employer should not be in a better position than that of any other creditor. An employer with a claim against an employee cannot avoid the legal process that other creditors must pursue simply by making paycheck deductions.

According to the Virginia Wage Payment statute, no employer may withhold any part of an employee's wages (except for payroll, wage or withholding taxes) without the employee's written and signed authorization. This provision leads to the seemingly obvious conclusion that the employer could comply with the statute simply by having the employee sign a blanket authorization upon hiring. Unfortunately, that is not the case. The Wage Payment statute further provides that the employee's written authorization must be specific and state the amount and purpose of any deductions from the employee's wages. Employers cannot circumvent this rule by requiring employees to sign an advance authorization for any such deductions. In fact, the Virginia code specifically states that employers may not require any employee, except executive personnel, to sign any agreement which provides for the forfeiture of the employee's wages as a condition of employment or for the continuation of such employment. Employers who "willfully and with intent to defraud" violate the Wage Payment statute are guilty of a misdemeanor and may be subject to civil penalties and attorneys' fees.

Finally, even with written authorization, some expenses or losses may not be deducted from employee wages. The employee may not be treated as an insurer of the employer's business. That is, problems like shoplifting and cash register errors are generally expenses the employer must bear. Lastly, an employer may not deduct so much from an employee's wages that the employee's wages, as calculated on an hourly basis, fall below the minimum wage level set by the Fair Labor Standards Act. 🏛️



# Recent Developments in Employment Law

by Jennifer L. Muse

## Federal Contractors Required to Use E-Verify

On June 6, 2008, President Bush signed Executive Order 12989 requiring federal contractors to use the Department of Homeland Security's electronic employment verification system, E-Verify, to confirm the identity and work authorization of all employees working on federal contracts and all employees hired by the federal contractor during the duration of any federal contract. On June 11, 2008, a Notice of Proposed Rulemaking was published, which clarifies the verification obligations of federal contractors. The Proposed Rule applies to federal contracts and subcontracts that exceed \$3,000 and requires contractors and subcontractors to: 1) enroll in E-Verify within 30 days of a contract award; 2) begin verifying the employment eligibility of all new employees of the contractor or subcontractor that are hired after enrollment in E-Verify; 3) continue using E-Verify for the duration of the contract; and 4) confirm the employment eligibility of all existing employees who perform work on the federal contract. The employment eligibility verification obligations under Executive Order 12989 will become effective when a final rule is published.


## Genetic Information Non-Discrimination Act

On May 21, 2008, President Bush signed into law the Genetic Information Non-Discrimination Act of 2008 ("GINA"). GINA prohibits employers from failing to hire, discharging, classifying or segregating, or otherwise discriminating against employees based on their genetic information. GINA defines genetic information to include not only genetic test results for individuals and their families, but also the manifestation of a particular disease or disorder in a family member, as well as participation in genetic research and requests for genetic services. GINA also makes it unlawful for an employer to request, require or purchase an employee's genetic information, except in certain circumstances, including compliance with family and medical leave laws. Employers possessing genetic information about employees must keep the information confidential and maintain it in separate files. GINA also amends ERISA and HIPAA for insurance plans. GINA's employment discrimination provisions will go into effect November 21, 2009.

## ADEA Ruling Places Greater Burden on Employers

The United States Supreme Court's recent ruling in *Meacham v. Knolls Atomic Power Laboratory* will make it more difficult for employers sued under the Age in Employment Act ("ADEA") to avoid liability and make those cases harder and costlier to defend. In *Meacham*, the Supreme Court ruled that the "reasonable factors other than age" defense is an affirmative defense on which the employer carries both the burden to produce evidence supporting the defense and to persuade the jury of the merit of that defense. The Court also rejected the use of the "business necessity" test in ADEA cases involving a disparate impact on older workers. In such cases, an employee will now need to establish that an employer's business practice has a disparate impact on older workers and then the employer must prove that the disparate impact was based on reasonable factors other than age.

## ADA Amendments Act

On September 25, 2008, President Bush signed into law the ADA Amendments Act. Please look forward to our next issue for more discussion on this topic. 

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